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In the

Supreme Court of the United States

OCTOBER TERM, 1969

No. 310

AUDLEY MOORE AND SON,
Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

ARTIE P. STEPHENS,
110 N. Davis St.,
Sulphur Springs, Texas.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
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In the

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OCTOBER TERM, 1969

No. .....

AUDLEY MOORE AND SON,

Petitioners,

v.

GENERAL INSURANCE COMPANY OF AMERICA,

Respondent.

To the Honorable Mr. Justice Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioners herein, Audley Moore and son, pray that a writ of certiorari issue to review the final action of the United States Court of Appeals, Fifth Circuit, entered on the 4th day of April, 1969, which said final decree upheld its decree entered on the 21st day of January, 1969, which reversed and remanded the judgment of the United States District Court for the Eastern District of Texas, in favor of the Petitioner.

The opinion of the Court of Appeals is attached as Exhibit A, and the Order Overruling the Motion for Rehearing is Exhibit B. The opinion of the Court of Appeals is reported in 406 F. 2d 442.

I.

JURISDICTION

The opinion of the United States Court of Appeals was entered on January 21, 1969, and Petitioner's Motion for Rehearing was denied on April 4, 1969.

Jurisdiction to grant this Petition is sustained by Title 28, U.S.C.A., Section 2101 and Title 28 U.S.C.A., Rule 19, Paragraph 1(b).

II.

QUESTIONS PRESENTED

1. Whether Petitioner's work of preparing its final estimate as required by the terms of its contract which included going onto the building site and measuring the quantity of concrete and asphalt work done by it was not work within the meaning of 40 U.S.C.A., Section 270b (a) and (b) as a matter of law as held by the United States Court of Appeals, Fifth Circuit.

2. Whether there was no evidence that Respondent's attorney was not its attorney prior to the filing of this cause of action as held by the United States Court of Appeals, Fifth Circuit.

3. Whether the United States Court of Appeals, Fifth Circuit, had jurisdiction over this case in view of the fact that Respondent's Motion for Judgment notwithstanding verdict had not been acted upon by the Trial Court and was and is still pending before the Trial Court.

4. Whether the United States Court of Appeals, Fifth Circuit, had authority to reverse this case with instructions to enter judgment for Respondent or whether its authority in the event that its reversal was proper was to remand to the Trial Court for a new trial.

III.

STATUTES AND RULES INVOLVED

1. The statute involved in this case is Title 40 U.S.C.A. Section 270b (a) and (b) which is set out in Exhibit C.

2. The rules involved are Rules 50(b) and 59(a) of the Federal Rules of Civil Procedure, Title 28 U.S.C.A. which rules are Exhibits D and E respectively.

IV.

STATEMENT OF THE MATTERS INVOLVED

1. This was a suit instituted by the Petitioner on April 20, 1967 under the Miller Act, 40 U.S.C.A. 270, against Respondent who was the bonding company for Professional Constructors, Inc. The Petitioner entered into a Contract (Plaintiff's Exhibit 1) with Professional Constructors, Inc., Respondent's insured, in connection with the construction of a United States Post Office Building in Sulphur Springs, Texas. Petitioner's Contract was essentially site work, concrete and asphalt paving. After April 2 or 4, 1966, the Petitioner did not do any more work in so far as laying concrete or pouring asphalt. Audley Moore and his son, the sole owners of Petitioner, in the latter part of April, 1966,

did go to the building site to make a final inspection and also to make measurements of the concrete and asphalt work it had done in order to prepare its final estimate. (Plaintiff's Exhibit 2) which was prepared on May 4, 1966. This evidence was uncontracted. The essential question involved under this question presented is whether or not this work done by Petitioner was work within the meaning of the Miller Act and the Contract between the Petitioner and Respondent's insured, Professional Constructors, Inc. The contract between Petitioner and Professional Constructors, Inc., (Plaintiff's Exhibit 1) contained among provisions on the front side * * *

> "4. The provisions on the reverse side hereof entitled 'General Provisions' are incorporated into and made a part of this agreement."

and on the reverse side * * *

> "3(a) On the 25th of each month * * * Sub-Contractor shall submit to the Contractor an estimate of materials on hand and work done."

2. The question under this paragraph is whether or not there was evidence that the Respondent's attorney was its attorney prior to the filing of this cause of action in that certain negotiations existed between the attorney for the Petitioner and the attorney for the Respondent in connection with the Respondent underwriting any judgment which might have been secured by the Petitioner in a State Court suit against the Respondent's insured. These negotiations became of importance based upon the Petitioner's alternative pleading estoppel.

3. The question presented in this paragraph concerns the question of whether the United States Court of Appeals, Fifth Circuit, acquired jurisdiction over this matter in that on October 13, 1967, the Respondent filed in the Trial Court its motion for judgment notwithstanding the verdict which was never acted upon by the Trial Court. And therefore, there was lacking a final decision which was necessary for appellate jurisdiction.

4. The question under this paragraph is whether or not in view of the fact that no action was taken on the Respondent's Motion for Judgment notwithstanding the verdict whether the United States Court of Appeals, Fifth Circuit, had authority to reverse this case with instructions to enter judgment for Respondent or whether its authority was limited to a reversal with instructions of remand to the Trial Court for a new trial.

V.

REASONS FOR GRANTING WRIT

1. The Supreme Court of the United States as well as all of the United States Court of Appeals have stated that a broad interpretation should be made of the Miller Act, 40 U.S.C.A. Section 270. The basic question then before this Court is whether or not the measurements and the preparation of Petitioner's final estimate constitutes work under the Miller Act, 40 U.S.C.A. 270b.

Section 270b Paragraph a of 40 U.S.C.A. provides as follows:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full thereof before the expiration of a period of 90 days after the date on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of said suit and to prosecute said action to final execution and judgment for the sum or sums justly due him." (Remainder of paragraph deals with persons not having a direct contract with the contractor furnishing a payment bond.)

The Court will note the wording of paragraph (a) that the labor or material referred therein is in connection with the work provided for in the contract. The Petitioner did make its final measurements in the latter part of April, 1966, and prepared its final estimate on May 4, 1966. The estimate that it prepared was a requirement of its contract with Professional Constructors, Inc., and this also constituted work as defined in paragraph a of Section 270b of the Miller Act.

The Court of Appeals held that the work of Petitioner's final measurements and preparation of its final estimate was no more than remedial or correction work and therefore was not labor supplied within the meaning of 40 U.S.C.A., Section 270b (b). The Court of Appeals in essence held that it would look to substantial compliance of the

contract as to determine the final date of labor or materials supplied. This is contra to the case of U.S. for use of Austin v. Western Electric Company, 337 F. 2d 568 (9 Cir.), at pages 572 and 573:

> "As noted supra, a subcontractor is required to give notice of his claim within 90 days from the date on which he performed the last labor or furnished or supplied the last material for which claim is made. He must file suit within one year from the same date. Appellees contend that the critical date is when the contract was 'substantially performed". Apparently, the district court adopted this test and found that the work was 'substantially completed' on October 25, 1960.
>
> "We do not find the phrases 'substantially performed' or 'substantially completed' used in any of the decided cases. A more accurate statement of the test to be applied is whether the work was performed and the material supplied as a 'part of correcting defeats, or making repairs following inspection of the project'."

The Courts have given liberal construction to the *Miller Act*. For example, *U. S. for use and benefit of Westinghouse Electric Supply Company v. Enderbrock-White Company*, 275 F. 2d 57 (4 Cir. 1960) dealt with the following facts:

Enderbrock was the general contractor and Aetna Casualty and Surety Company was the bonding company. Mechanical Engineering Corporation was one of Enderbrock's subcontractors and Westinghouse was a supplier of materials to Mechanical. The question before the Court was whether or not Westinghouse gave notice within ninety days after delivery of its material to Mechanical in compliance with the Miller Act. The last material from Westinghouse de-

livered on the job site was October 16, 1967. On January 15, 1958, Westinghouse notified Enderbrock by registered mail that Mechanical was indebted to it in the sum of $3,962.51. However, on December 31, 1957. Westinghouse in compliance with Mechanical's purchase order delivered to it at Westinghouse's warehouse bushings costing $2.11 which Westinghouse believed was to be used on the job in question. However, these bushings were used elsewhere. Thereafter Westinghouse amended its letter of January 15, 1958 on February 18, 1958, by adding to its original notice the cost of the bushings, $2.11. The Circuit Court in deciding that the time of notice commenced with the delivery date of the bushings reviewed some of the most recent cases dealing with time limitation under the *Miller Act*. One of such cases reviewed was *United States for use and benefit of J. B. Byrne & Co. v. Fire Association of Philadelphia*, 260 F. 2d 541 (2 Cir.) which is as follows:

> "The latest case on the question here under consideration which has come to our attention is *United States for Use and Benefit of J. B. Byrne & Co. v. Fire Association of Philadelphia*, 2 Cir. 260 F. 2d 541. There the prime contract was for excavation work on the Grass River Lock, a part of the St. Lawrence Seaway project. Heavy earth-moving motor equipment was required, and by reason of the abrasive nature of the earth at the site, the steeply inclined road, and the fact that much of the work was done during sub-zero weather, unusual wear on the tires resulted. From the inception of the contract, the repair and replacement of tires was expected to be, and was, a constantly recurring item. The use plaintiff's claim was for the repair and replacement of tires on the earth-moving equipment. Defendant contended that the burden was on plaintiff to show that the tires were substantially consumed

by the work, and that it was not liable for tires which were diverted by the contractor for use on non-bonded jobs. In overruling defendant's contentions and approving a judgment for the use plaintiff, the court said, at page 545:

"The contsruction sought by appellant creates other difficulties. Thus requiring the supplier to trace specific materials after they have left his control may often place upon him an impossible burden of proof even when the items involved were in fact consumed. Moreover, even if appropriate tracing measures could be devised, the courts, in enforcing one remedial policy, should be hesitant to compel an industry to accept what may be artificial and burdensome accounting practices. But these problems aside, the policy of the Miller Act dictates that an exception ought not to be carved out of the surety's liability for materials not actually consumed. For the statutory bond is of value to materialmen in our credit economy only as its coverage is predictable at the time the contract for the materials is created. Businessmen look to more than the contents of their cash registers in conducting their affairs. If, because the surety's liability is held suspended until the goods are consumed, the bond has little effect on the degree of certainty with which the supplier can expect to receive the purchase price of the materials sold or to be sold under the contract, it little aids the financial position of the persons Congress sought to benefit."

And, also the case of *U. S. for the use of Sherman et al. v. Carter*, 353 U.S. 210, 73 S. Ct. 793 (S.C. 1957) is illuminating as to what constitutes labor under the Miller Act. This case involved an action by the trustees of a welfare fund of a labor union on a Miller Act bond furnished by the contractor, Carter, in connection with the construction of a federal building. The contractor had entered into a con-

tract with the labor union under which the contractor was obligated to pay the laborers wages at specified rates and in addition to pay 7½ cents per hour of their labor to the trustees of a welfare fund. The contractor failed to pay in full the required contributions to the welfare fund and the trustees of the fund sued the surety of the Miller Act payment bond to recover the balance due the fund, plus liquidated damages, attorneys fees, Court costs and expenses. It was pointed out that under the contract, the contributions were payable in monthly installments with the provision that if any installment was not paid on schedule the sum of $20.00 per delinquency or 10% of the amount due, whichever was greater, would be paid as liquidated damages, and with the further provision for the payment of reasonable attorneys fees, court costs, and other reasonable expenses in the event that the trustees were required to file suit on the contract.

The Court held that although the laborers employed had no right, title or interest in the contributions to the welfare fund, the obligation assumed was part of the labor contract and to this extent was labor supplied in the prosecution of the work within the meaning of the Miller Act bond. The Court held that the contributions provided for in the contract constituted a valid claim against the surety and that recovery would also be allowed for liquidated damages, attorneys fees, court costs and other related expenses of the litigation, since such formed a part of the consideration for the contract. In so holding, the Court emphasized the provisions of the *Miller Act*, which expressly entitled the supplier to be "paid in full" and to a judgment for the

"sum or sums justly due him". The following are excerpts from the Court's opinion:

> "* * * the essence of it policy *(Miller Act)* is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material * * *."

ALSO

> "* * * not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements."

ALSO

> "* * * as long as Carter's obligations relating to compensation for labor have not been satisfied his employees will not have been 'paid in full' and the Miller Act will not have served its purpose."

ALSO

> "The trustees' claim for liquidated damages, attorneys' fees, court costs and other related expenses of this litigation has equal merit. The contractor's obligation to pay these items is set forth in the trust agreement. It is stipulated that they form a part of the consideration which Carter agreed to pay for services performed by his employees. If the employees are to be 'paid in full' the 'sums justly due' to them, these items must be included. Their amount, however, remains to be determined.
>
> "We hold that the *Miller Act* makes the surety liable on its payment bond for the delinquent contributions to the fund, together with the additional items above described. * * *".

Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F. 2d 527 (5 Cir. 1946), says that the courts inquire into whether

or not the plaintiff under the *Miller Act* furnished labor or material under the term of its contract. In the *Glassell* case, the subcontractor undertook to furnish sand and gravel to the prime contractor for use in the building of an airdrome. In this work, the subcontractor used a fleet of trucks, which of course required gasoline and oil. The gasoline and oil were procured from the use plaintiff. In the mornings, after procuring the necessary gasoline and oil, the trucks "were then driven to the airdrome site to ascertain if any material was needed. If there was hauling to be done the trucks would then go to one of the pits and haul the type of material the foreman or engineer was ready to use. If there was no work the truck driver went wherever he pleased and burned the gasoline and oil as he saw fit, either to work at another job or to travel at his pleasure". Although obviously some of the gasoline and oil furnished by the use plaintiff was not used in the prosecution of the contract, the court allowed recovery for the full amount of such gasoline and oil furnished. The court said at page 529:

> "And deliveries were made under circumstances which fully justified the use plaintiff in believing not only that they would be, but that they were in fact, used by the sub-contractor in the fulfillment of his contractual obligation. * * *"

And also:

> "The *Miller Act*, like the *Heard Act* in its original form and as amended in 1905, 40 U.S.C.A. §270a note, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to ef-

fectuate the Congressional intent to protect those who furnish labor or materials for public works. The statute and the bond given under it speaks of paying 'persons supplying labor and materials in the prosecution of the work'. The Supreme Court has repeatedly held that these quoted words in particular should be liberally construed. Thus in *United States to Use of Hill v. American Surety Co.*, 200 U.S. 197, 26 S. Ct. 168, 50 L. Ed. 437, materials furnished to a subcontractor were held covered by the contractor's bond. In *Title Guaranty & Trust Co. v. Crane Co.*, 219 U.S. 24, 34, 31 S. Ct. 140, 55 L. Ed. 72, the claims for which recovery was allowed under the bond included not only cartage and towage of material, but also claims for drawings, patterns, used by the contractor in making molds for the castings entering into the construction of the ship. In *United States Fidelity & Guaranty Co. v. Bartlett*, 231 U.S. 237, 34 S. Ct. 88, 58 L. Ed. 200, where the work contracted for was the building of a break-water, recovery was allowed for all the labor at the quarry opened 50 miles away. This included the labor not only of men who stripped the earth to get the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included also the claims of stablemen who fed and drove the horses which moved the cars on those tracks. In *Illinois Surety Co. v. John Davis Co.*, 244 U.S. 376, 37 S. Ct. 614, 61 L. Ed. 1206, the court allowed recovery not only for the rental of cars, trucks and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment and the freight paid thereon to transport it to the place where it was used. In *Brogan v. National Surety Co.*, 246 U.S. 257, 38 S. Ct. 250, 62 L. Ed. 703, L.R.A. 1918D, 776, it was held that laborers and materials not incorporated into the work were covered and where, because of special circum-

stances, the contractor had to board the laborers, that provisions furnished to him for that purpose were covered. In *Standard Accident Insurance Co. v. United States for use and benefit of Powell et al.*, 302 U.S. 442, 58 S. Ct. 314, 315, 82 L. Ed. 350, the court held that a common carrier by railroad could recover under the statute for freight charges for transporting materials on the ground that the railroad was a corporation which had furnished labor in the construction of a public building. It was observed in that case that the Supreme Court was committed to the doctrine that the statute should be 'liberally construed in aid of the evident public object — security to those who contribute labor or material for public work.'

"In the light of these decisions it follows that the strict letter of the Act must yield to its evident spirit and purpose when this is necessary to give effect to the intent of Congress. *Rector, etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 36 L. Ed. 226; *Ozawa v. United States*, 260 U.S. 178, 194, 43 S. Ct. 65, 67 L. Ed. 199. And unjust and absurd consequences are, if possible, to be avoided. *Lau Ow Bew v. United States*, 144 U.S. 47, 59, 12 S. Ct. 517, 36 L. Ed. 340; *Hawaii v. Mankichi*, 190 U.S. 197, 213, 23 S. Ct. 787, 47 L. Ed. 1016."

The Petitioner completed its last work under the terms of its contract with Professional Constructors, Inc., on May 4, 1966, and therefore its suit against respondent was timely filed.

2. The question presented under this paragraph is whether or not there was evidence that the Respondent's attorney was its attorney prior to the filing of this cause of action and during the time negotiations were being made between the respective attorneys of the Petitioner and the Re-

spondent with respect to the Respondent underwriting a judgment which the Petitioner might obtain against its insured in a cause of action filed against its insured by the Petitonier in a State District Court. This matter becomes essential based upon the Petitioner's alternative pleading of estoppel. The evidence in the case supports the finding of the jury that Respondent's attorney was its attorney during these negotiations. This is further supported by the exhibits attached hereto as F, G, H and I which the Petitioner requested that the Court of Appeals take judicial knowledge of.

3. The question presented under this paragraph is whether or not the United States Court of Appeals acquired jurisdiction over this case in view of the fact that Respondent's Motion for Judgment notwithstanding verdict had not been acted upon by the Trial Court and was still pending at the time this matter was appealed and at the present time is still pending before the Trial Court. On September 19, 1967, the jury returned a verdict in favor of the Petitioner in the amount of $16,345.78 and the Court thereafter awarded attorney fees in the amount of $5,448.60. On October 13, 1967, the Respondent filed its Motion for Judgment notwithstanding the verdict. On January 26, 1968 judgment was entered by the Trial Court in favor of the Petitioner in accordance with the verdict of the jury. On February 6, 1968, the Respondent filed its Motion for New Trial which was overruled by order of the Trial Court entered on February 26, 1968. Thereafter on March 19, 1968, the Respondent gave notice of appeal from the judgment entered on Jan-

uary 26, 1968, and the order overruling its Motion for New Trial. No action has been taken on the Respondent's Motion for Judgment notwithstanding the verdict and therefore there was lacking a final decision necessary to appelate jurisdiction. *Green v. Reading Co.*, 180 F. 2d 149 (3rd Cir. 1950); *Fast, Inc., v. Shaner*, 181 F. 2d 937 (3rd Cir. 1950); *Healey v. Pennsylvania Railroad*, 181 F. 2d 934 (3rd Cir. 1950); and *Smith v. Insurance Company of North America*, 213 F. Supp. 674 (MD Tenne. 1962).

4. The point under this paragraph is whether or not the United States Court of Appeals, Fifth Circuit, had authority to reverse this case with instruction to enter judgment for Respondent when there had been no Action upon the Respondent's Motion for Judgment notwithstanding the verdict. This Court has denied the United States Court of Appeals of such authority. *Cone v. West Virginia Pulp & Paper Company*, 330 U.S. 212, 67 S. Ct. 752 (S. C. 1947).

The action of the United States Court of Appeals, Fifth Circuit, with respect to propositions 1, 3 and 4 is contrary to the rules of law announced by this Court and also the other United States Court of Appeals. The action of the United States Court of Appeals, Fifth Circuit, on point 2 is one of interpretation; however, we believe the Court to be in error in its holding. It is the further position of the Petitioner that United States Court of Appeals, Fifth Circuit, has decided propositions 1, 3 and 4 in such a way that it conflicts with the decisions of the other United States Court of Appeals and of this Court and has departed so far from the accepted and usual course of judicial proceedings as to warrant this

Honorable Court to grant the Petition for Certiorari to reverse the decision of the United States Court of Appeals, Fifth Circuit, and affirm the judgment of the Trial Court or in the alternative to render judgment that the United States Court of Appeals, Fifth Circuit, was without jurisdiction and remand this case to the Trial Court for hearing on Respondent's Motion for Judgment notwithstanding the verdict, or further in the alternative in the event the judgment of the United States Court of Appeals, Fifth Circuit, is affirmed to reverse that part of its judgment directing the district to enter judgment for the Defendant, but remand same with instructions to grant the Respondent's Motion for New Trial.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

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Artie P. Stephens

Artie P. Stephens

A copy of the foregoing Petition for Writ of Certiorari was furnished Counsel for Respondent, Mr. Don W. Davis, by mailing same to him, postage prepaid, at his address at 830 Mercantile Bank Building, Dallas, Texas 75201.

Artie P. Stephens

Artie P. Stephens